

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No. : 10/759,218
Applicant : Durward I. Faries, Jr. et al.
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Examiner : Jagan, M.
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Docket No. : 1322.0057CNT
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Title : Method and Apparatus for Monitoring Temperature of
Intravenously Delivered Fluid and Other Medical Items

APPELLANTS REPLY BRIEF

Commissioner for Patents
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Sir:

This Reply Brief is filed in response to the Examiner's Answer mailed April 10, 2008.

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Applicant's Remarks to Examiner's Answer

The following remarks are in response to the Examiner's comments set forth in section “(10) Response to Argument” (pages 7-8) of Examiner's Answer. These remarks are further intended to supplement the arguments set forth in the Appellant's Brief.

Claims 71 and 72 are not anticipated by Jordan

In responding to Appellant's arguments regarding the rejection of claims 71 and 72 as being anticipated by Jordan (U.S. Patent No. 5,875,282), the Examiner asserts that these claims do not recite the feature of the temperature sensing assembly and display being affixed to the same panel. This is incorrect.

Claim 71 recites *“a temperature sensor assembly to directly measure medical item temperature and visually indicate said measured medical item temperature, wherein said temperature sensor assembly is affixed to one of said first panel, said second panel and said base.”* (emphasis added). Claim 72 recites *“directly measuring a medical item temperature and providing a visual indication of said measured medical item temperature via a temperature sensor assembly, wherein the temperature sensor assembly is affixed to one of the first panel, the second panel and the base.”* (emphasis added).

Clearly, the temperature sensor assembly of claims 71 and 72 includes the features of: (1) directly measuring the temperature of the medical item; and (2) also a visual indication of the measured temperature. In other words, the recited temperature sensor assembly includes suitable structure which provides a visual indication (e.g., a digital or other visual display, color indication display, etc.) of the measured temperature, and this visual indication structure must be affixed to the same panel (i.e., first panel, second panel or base) as the structure of the temperature sensor assembly which directly measures the temperature of the medical item.

If the Examiner is asserting that any visual display structure showing measured temperature (e.g., a temperature display such as display 34 shown in Fig. 1 of Jordan) is not part of the recited temperature sensor assembly, this is an unreasonable, improper and incorrect interpretation of the language of claims 71 and 72.

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Since it is very clear from Figs. 1 and 4 of Jordan (and this has not been disputed by the Examiner) that the temperature display 34 is affixed to a different support surface than the base surface to which the structure that measures the temperature of the medical item is affixed (construed by the Examiner as sensor 80, layers 82, stainless steel layer 84 and temperature adhesive layer 86), Jordan cannot anticipate claims 71 and 72.

Claims 47-49, 52, 54, 55, 58-61, 64, 66, 67, 69 and 70 are not obvious over Kashyap in view of Jordan

In responding to the rejection of claims 47-49, 52, 54, 55, 58-61, 64, 66, 67, 69 and 70 as being obvious over Kashyap (U.S. Patent No. 4,336,435) in view of Jordan, Appellants have pointed out the unreasonable position the Examiner has taken in construing the bag holder 21 of Kashyap as a medical device for visually indicating a temperature of a medical item placed therein in the effort to reject claims 47 and 59. Clearly, the medical device described in Kashyap is the entire microwave apparatus 4, and the bag holder is just one component of this apparatus. The bag holder 21 of Kashyap is clearly not designed or intended to act as a stand alone medical device for visually indicating a temperature of a medical item as recited in claims 47 and 59.

In addition, Appellants have pointed out that Kashyap fails to describe the recited feature of a temperature sensor assembly to directly measure medical item temperature and visually indicate the measured medical item temperature. The Examiner asserts that this is not persuasive, since this feature is not recited in the rejected claims. The Examiner is incorrect.

Claim 47 recites "*a temperature sensor assembly to directly measure medical item temperature and visually indicate said measured medical item temperature*", while claim 59 recites "*directly measuring medical item temperature and providing a visual indication of said measured medical item temperature via a temperature sensor assembly*". Clearly, the recited temperature sensor assembly must include suitable structure that directly measures medical item temperature and visually indicates the measured medical item temperature.

Appellants have further pointed out that the Examiner has provided no indication as to where a visual indication of measured medical item temperature would be provided on the bag holder 21 of Kashyap. Assuming that it would have been obvious to provide a visual

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temperature indicator to the device of Kashyap (based upon the teachings of Jordan), it is likely that such indicator would be provided on an outer wall surface of the microwave apparatus 4 where it can be visually communicated to the user of the device, and not anywhere on the bag holder 21 or on any other structure located internally within the microwave cavity 5 of the microwave apparatus 4.

The Examiner maintains the position that a temperature display could be provided "*on the support structure/thermal treatment system*" of the bag holder 21 (see page 5 of the Examiner's Answer). The Examiner also states the following (see page 8 of the Examiner's Answer):

"Furthermore, Appellant's arguments (page 15-16) that the medical device (21) does not and would not likely be modified to visually indicate temperature are not persuasive since the rejections are based on providing the display on the support structure/thermal treatment system (4) and not on the medical device (21)."

In making this statement, the Examiner appears to now refer to the microwave apparatus 4, which supports the bag holder 21 within microwave cavity 5, as the structure on which a visual temperature display can be provided (rather than on the bag holder 21 itself). In the event the Examiner does not construe the microwave apparatus 4 of Kashyap as part of the bag holder 21 (which the Examiner construes as the recited medical device), then the Examiner has acknowledged that the bag holder 21, when considered by itself, does not include a temperature sensor assembly to directly measure medical item temperature and visually indicate the measured medical item temperature as recited in claims 47 and 59.

On the other hand, if the Examiner now construes the entire microwave apparatus 4 of Kashyap as the recited medical device (since the microwave apparatus 4 is support structure for the bag holder 21 and should therefore be part of the medical device as interpreted by the Examiner), then this interpretation of a medical device cannot meet the limitation in claims 47 and 59 that "*said medical device is configured such that any thermal treatment of said medical item received within said receptacle occurs only via heat transfer between said medical item and an external environment surrounding said medical device*". (emphasis added). Clearly, heating of the medical item occurs within microwave cavity 5 of microwave apparatus 4 of Kashyap.

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The Examiner's position with respect to claims 47 and 59 is unreasonable and improper. The Examiner cannot on the one hand construe only the bag holder 21 of Kashyap as the recited medical device and, on the other hand, construe the microwave apparatus 4 as supporting structure for the bag holder 21 (without the microwave apparatus being considered part of the medical device). Therefore, claims 47 and 59 (as well as their dependent claims) should be allowed over any combination of Kashyap with Jordan.

Claims 71 and 72 are not obvious over Ginsburg in view of Jordan

In responding to Appellant's arguments regarding the rejection of claims 71 and 72 as being obvious over Ginsburg in view of Jordan, the Examiner maintains the position that these claims do not recite that the temperature sensing assembly and display are affixed to the same panel. This flawed and incorrect interpretation of claims 71 and 72 has been previously noted for claims 71 and 72. Consequently, no combination of Ginsburg with Jordan renders obvious claims 71 and 72.

For all of the reasons set forth above as well as in the Appeal Brief, Appellants respectfully submit that none of claims 47-49, 52, 54, 55, 58-61, 64, 66, 67, 69 and 70 is anticipated or rendered obvious by Jordan or any combination of Jordan with Kashyap or Ginsburg.

In view of the foregoing it is submitted that the rejections of claims 47-49, 52, 54, 55, 58-61, 64, 66, 67, 69 and 70 are improper and should be reversed.

Respectfully submitted,

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